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Restorative Justice and Mediation in Penal Matters

A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries

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Belgium

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Introduction

This chapter presents an overview of restorative justice in Belgium as it appears at the end of 2013. Restorative justice in Belgium mainly takes the form of victim-offender mediation, both in juvenile justice and in adult criminal law. However, the conferencing model is also present, as are peacemaking circles at an experimental level. Restorative justice in Belgium is relatively well known, and many endorse its values and principles. However, as we will see, this does not necessarily result in a broad application of restorative justice in practice.

In the following sections, we first present the recent history of restorative justice in the country and explain in which societal context the programmes were started and further developed. Then the various legal frameworks for restorative justice in Belgium are discussed in more detail in *Section 2*, from the pre-court to the post-sentence level, both for juveniles and adults. *Section 3* deals with the organisational structures for restorative justice and restorative justice processes. Figures and research on restorative justice are summarised in *Section 4*, and we end with some conclusions and reflections on the future in *Section 5*.

1. Origins, aims and theoretical background of restorative justice

1.1 Overview on forms of restorative justice in the criminal justice system

Anno 2013, restorative justice (RJ) is well established in Belgium. Restorative justice interventions are widely available both in the field of juvenile justice and adult criminal law. The various types of programmes – victim-offender mediation

(VOM) and family group conferencing (conferencing) – all adopted a legal basis during the 1990s and early years of the new century. 'Restorative justice interventions' are usually understood in their narrow sense and therefore restricted to programmes of victim-offender mediation and conferencing. However, some argue to broaden the scope of restorative justice and to also include – under certain conditions - court imposed reparation orders, community service and even victim assistance.[1] For the sake of clarity, and taking into account definitions promoted through international guidelines,[2] we have limited the Belgian overview to the core types of *restorative justice interventions*, namely victim-offender mediation and family group conferencing. At the same time, it is true that in Belgium *restorative justice values and principles* are adopted by many agencies and professionals working in the broad field of crime control and criminal justice, without applying mediation or conferencing practices as such themselves.

In Belgium, the following RJ interventions are available throughout the whole country (i.e. services are present in each of the 27 judicial districts) and regulated by law: in the field of juvenile justice, mediation and conferencing; in the field of adult criminal law, 'penal mediation' and 'mediation for redress'.[3] The main difference between penal mediation and mediation for redress lies in their scope of application: whereas the former is conceived as a type of diversionary measure for less serious crimes at the level of the public prosecutor's settling of the case, the latter can be applied to crimes of all degrees of seriousness at the consecutive phases of the criminal justice process including the administration of the sentence. Finally, also regulated by law and applicable to both minors and adults, but not implemented in a uniform way throughout the country, is the practice of mediation under the system of 'municipal administrative sanctions'. Besides these legally established restorative justice interventions, the origins, legal frameworks and functioning of which are discussed in more detail in the following pages, a few other types of mediation programmes for minor crimes operate without a legal basis, and they are only available in some parts of the country: mediation at the police level and mediation

1 *Walgrave* 2000.

2 Most important here is to refer to the 2002 UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, where 'restorative outcomes' are defined as resulting from 'restorative processes', i. e. processes where at least victim and offender participate.

3 'Conferencing' is only available for juveniles, for which the legal term is 'herstelgericht groepsoverleg' (hergo) in Dutch and 'concertation restauratrice en groupe' in French. 'Penal mediation' refers to the legal terminology of 'bemiddeling in strafzaken' (Dutch) or 'médiation pénale' (French). 'Mediation for redress' ('herstelbemiddeling' in Dutch, 'médiation après poursuite' in French) is sometimes also translated into English as 'restorative mediation' or 'the general offer of mediation'.

by the justice of the peace. Finally, an experimental project on peacemaking circles was set up in the period 2011-2013.

For a good understanding of the following overview of restorative justice programmes, it is important to keep in mind the federal state structure of Belgium, and the ongoing process of state reform which grants more competences to the Communities and the Regions. Under the Constitution there are three cultural Communities (the Flemish, the French and the German) and three economic Regions (the Flemish, the Walloon and the Brussels Region). Brussels conurbation has a bilingual status. Whereas the Federal State keeps its main competence for matters such as justice, national defence and international relations, the Communities are responsible for 'person-related' and social matters. Obviously, restorative justice finds itself in-between these two spheres of competence. However, at the end of 2011 a new state reform process began, which will ultimately pass juvenile justice and the administration of community sanctions and measures for adults from the federal level to the Communities and Regions. The organisation of the court system remains federal competency. The number of judicial districts ('arrondissements') will be reduced to 12 in the course of 2014.

1.2 Reform history and contextual factors[4]

1.2.1 Juvenile assistance

The history of restorative justice in Belgium begins with the development of mediation practices within the domain of juvenile assistance. The first mediation initiatives with juveniles started in the late 1980s, both in Flanders and Wallonia. It was a handful local NGOs who initiated pilot projects and who took the lead during the following ten years. These small scale initiatives witnessed expansion towards the end of the 1990s. Until 2006, they were operating within the framework of the Juvenile Justice Act of 1965. This law was clearly based on a rehabilitative philosophy (the so-called 'protection model') and did not contain explicit references to mediation. Hence, it is within a context of educational objectives that juvenile assistance services, both in the Flemish and French Community, became interested in setting up mediation schemes. For many years, however, the number and practice of mediation programmes for juveniles remained rather limited. Several reasons can be mentioned for this rather hesitant development: the strong identification with a strict (offender oriented) educational role by many social workers, the mixing up of mediation with community service and other educational measures, and the lack of a clear

4 More detailed information about the origins and general development of restorative justice in Belgium can be found in: *Aertsen* 2000, 2004, 2006; *Willemsens* 2004; *Van Camp/De Souter* 2012.

legal framework and of well-defined policies at the national and the regional level promoting and funding mediation programmes.[5] This context hindered a breakthrough of victim-offender mediation programmes for many years.

A new impetus was given in 1999 when the Flemish government, after a resolution by the Flemish Parliament on the further development of the juvenile assistance sector, decided to implement 'restorative justice programmes' in each judicial district. Under the general notion of 'restorative justice', three models were promoted: victim-offender mediation, community service and training programmes. Local NGOs received subsidies to realise these three types of practices, which are most frequently carried out by one and the same organisation. More or less the same policy was followed by the French Community and the Walloon Region, which resulted in a wider implementation of restorative justice programmes throughout the country.

In the meantime, more precisely in 2000, on the initiative of the KU Leuven Institute of Criminology a conferencing pilot project in the form of an action-research was initiated in four different locations. The approach was based on the New Zealand model of family group conferences, but in the Belgian initiative it was decided to mainly address more serious offences.[6]

Repeatedly, legislative initiatives were taken at the federal level during the first years of 2000 to amend the 1965 Juvenile Justice Act. In these proposals, mediation and conferencing were given a clear and central position. However, differences in vision on the future of juvenile justice between the southern and the northern part of the country hampered reaching a political consensus for years. The Walloon strongly defended a youth protection model, whereas the Flemish were more in favour of a legal rights and/or restorative justice approach. Societal unrest caused by the murder of Joe Van Holsbeek by two juveniles finally resulted in the adoption of a new Youth Justice Act by the Federal Parliament in 2006. The Youth Justice Act 2006 clearly prioritises restorative justice options, mainly in the form of mediation and conferencing, although rehabilitative and punitive measures are part of the legal provisions as well. Generally, the legal approach aims at assisting the young offender to assume responsibility and to take the victim's rights into account, which is considered to be a more appropriate and effective response than the previous youth protection model.[7] Through this new legal framework, restorative justice programmes with juveniles have been implemented widely and mandatorily in every judicial district all over the country.

Finally, a so-called Compensation Fund must be mentioned as well. This was established by the NGO Oikoten in 1991 and was implemented later in

5 *Aertsen* 2006, p. 69.

6 *Vanfraechem* 2005, 2007; *Vanfraechem/Walgrave* 2004a; 2004b.

7 *Put/Vanfraechem/Walgrave* 2012, pp. 88-89.

every Flemish province on the basis of local formal agreements (but without a legal framework). This fund is available - within the context of a mediation process – to juveniles who have no financial means to reimburse the victims for the damages. The offender is allowed to undertake voluntary work for a non-profit organisation for a limited number of hours, for which he is paid by the fund. These earnings then will be passed to the victim.[8]

1.2.2 Adult criminal law

Belgium, contrary to developments in many other countries, has witnessed a much stronger and rapid growth of restorative justice in adult criminal law than in the field of juvenile justice. Two main models of victim-offender mediation have been initiated in the early 1990s, whereas other, related practices have been developed as well. However, socio-political contexts and objectives have been orienting the implementation of the respective models in divergent directions.

Penal mediation

The political context of the early 1990s favoured a quick start of the new practice of 'penal mediation' in Belgium. After a short experimental period on the initiative of one of the Prosecutors-general, penal mediation adopted legal status in 1994. The ease by which this (and other) legislation took place must be seen against the background of the political situation of those days. Confronted with the success of the extreme right party 'Vlaams Blok' during the parliamentary elections of 1991, the federal government felt urged to develop multi-faced policies in order to tackle insecurity problems in society and to regain public trust. Penal mediation, a diversionary measure at the level of the public prosecutor, was part of the governmental strategy. This legislative initiative had at least a double official aim: on the one hand, providing a quick social reaction to common 'city crime' and, on the other hand, paying more attention to the victim. In minor criminal cases, for which a penalty of over two years imprisonment does not seem necessary to the public prosecutor, the law offers the possibility of imposing on the suspect one or more conditions or measures which, when complied with, result in the extinction of the public action. However, mediation is only one of the possible measures within this legal framework (the others being counselling, training and community service) and therefore, the term 'penal mediation' as a generic title for this new legal procedure was clearly mistaken. Inspiration for this new Belgian law was found in France, where 'médiation pénale' was already being applied with a similar orientation already for some years.

8 *Van Garsse* 2007; *Van Doosselaere/Vanfraechem* 2010, p. 59.

Penal mediation is applied in each judicial district from within the public prosecutor's office. 'Justice assistants', who are civil servants in the so-called 'Houses of Justice' under the Ministry of Justice, play a central role in the mediation process. Quantitatively, the legal system of penal mediation has developed quite fast.

Mediation for redress

'Mediation for redress' goes back to a 1993 initiative of the KU Leuven Institute of Criminology, in partnership with the local public prosecutor and a NGO working with victims and offenders.[9] Victimological and penological research findings, together with emerging international publications on restorative justice, formed the basis for this initiative. The pilot project aimed at developing a concept and a method for mediation for more serious crimes, which do not qualify for a conditional dismissal or for 'penal mediation'. Not being a diversionary measure, the purpose was to also study the impact of this type of mediation on the decision making processes by the public prosecutor and the judge, and more generally to find out how and to which extent this restorative approach could challenge the retributive rationales of the criminal justice process. After an experimental period of three years, the project adopted a more definitive status. It became a national programme, received funding from the Ministry of Justice, and gradually the model was transferred to other judicial districts. Two umbrella organisations, the Flemish NGO Suggnomè and the Walloon NGO Médiante became responsible for the implementation of the model throughout the country. Apart from the high level nature of crimes dealt with, a particularity of 'mediation for redress' was the consistently built-up and bottom-up approach through the establishment of local partnerships which support and direct the programme.

In 2005, mediation for redress adopted a legal status, in order to establish legally the model in each judicial district. The law considers mediation as an offer to victims and offenders that can be made at each stage of the criminal justice process, including the administration of the (prison) sentence, and independently of the nature and the degree of seriousness of the crime. The mediation work is carried out by professional mediators who are employees of the two aforementioned NGOs and who have offices at each judicial district.

Mediation at the police level

Since 1996, mediation programmes have been set up in some Flemish cities and in various municipalities of the Brussels Region. The total number of

9 *Peters/Aertsen* 1995; *Aertsen* 1999; *Van Garsse* 2001; *Aertsen* 2004, pp. 214-220; *Lauwaert* 2008, pp. 67-86.

programmes has never been higher than 11. This model took form within or in a close cooperation with local police departments. Common features of these programmes were their main focus on minor property (and violent) offences with clearly specified financial or material damages, for which a (rapid) settlement can be reached. The mediators are civil servants, not policemen. The programmes are supported by federal government funding related to security and employment policies. The mediation programmes at the level of the police are based on divergent ideologies, going from civil dispute resolution over community policing to zero tolerance.[10]

Restorative justice in prisons

The option to integrate restorative approaches in the criminal justice system as a whole, which initially inspired the 'mediation for redress' programme in 1993, resulted in 1998 in a pilot project and action-research in six prisons by the criminological institutes of the universities of Leuven and Liège in order to develop a restorative justice approach to be applied during the administration of the prison sentence.[11] In 2000, the Minister of Justice decided to implement this restorative justice model in each prison of the country. The most important instrument to realise this was the appointment of a full time 'restorative justice advisor' in each prison, operating at the level of prison management. His/her task was not to work on a case-by-case basis with inmates and victims, but to support within the prison system the development of a culture, skills and programmes which give room to the victims' needs and restorative answers. Examples of actions were the training of prison officers and other staff and the development of specific programmes in prison in cooperation with external agencies such as victim support and mediation services.[12] However in 2008, the function of restorative justice advisor was abolished on the initiative of the Ministry of Justice. The reasons for this rather unexpected withdrawal, after eight years of practice and a lot of international attention, are not clear.[13] The function of restorative justice adviser was transformed into a more general one to assist the prison governor in general management tasks.

In 2001, in cooperation with the then restorative justice advisors, the NGO Suggnomè started a pilot project for mediation between prisoners and their

10 *Lemonne/Aertsen* 2003; *Aertsen* 2009.

11 *Robert/Peters* 2003; *Aertsen* 2005.

12 *Hodiaumont* et al 2005.

13 According to the official version, eight years of development had integrated restorative approaches sufficiently in daily prison life. For many field workers and other experts, the decision to abolish the function of restorative justice advisor was premature (see also *Aertsen* 2012).

victims. Two independent mediators, based in the local 'mediation for redress' services, offered mediation on request of the inmate, the victim or the victim's family. The programme, which received additional funding from the Flemish Community, focused on serious crimes, including cases of rape, armed robbery and murder. With the law of 2005 coming into practice, the programme became part of the general mediation for redress offer. Hence, mediation is now available in all prisons of the country.

1.2.3 Other contexts for mediation

Two other programmes, where mediation can be offered after crime, have to be mentioned.[14] 'Prorela' refers to a project initiated in the region of Antwerp in 2002 where the justice of the peace – who is a civil judge – in close cooperation with the local police and the public prosecutor, offers mediation for crimes which emerged in a relational context, i. e. between adult persons who are familiar to each other (family members, neighbours, etc.). Crimes dealt with include slander, not respecting maintenance allowance or visiting rights after divorce, violent incidents between neighbours or colleagues, etc. The project has been taken up by a few other judicial districts of the Flemish region, without being nationally implemented.

Another context for mediation originated when in 2004 the system of municipal administrative sanctions, introduced by the law of 1999, broadened its field of application. Municipal administrative sanctions (GAS) give local municipal authorities the competence to impose fines or to take other measures against petty offences and acts of public nuisance. The purpose of the new approach was to show a quick reaction to forms of anti-social behaviour and to lighten the workload of the courts and the police. The whole procedure is applied by a municipal civil servant without intervention of a judicial authority. Within the system of municipal administrative sanctions, also mediation can be offered, which is even mandatory when the offender is a minor. Eight out of ten municipalities have adopted the GAS system, but a new enlargement of its field of application in 2013 has been criticised by various groups in society because of its excessive use for all types of so-called disturbing behaviour by juveniles.

1.3 Societal influences and international standards

The broad development of restorative justice in Belgium, as sketched above, has taken place against a social and political background which might - at least

14 Moreover, also in the field of civil law in Belgium various mediation programmes and practices exist, which often have their own legal and institutional frameworks, such as neighbourhood mediation, family mediation, commercial and social mediation. This broad field of mediation falls beyond the scope of our overview.

partly - apply to other countries in Western Europe as well. Typical - but again not unique - for the Belgian situation has been the role of specific incidents that caused major social unrest. The notorious Dutroux case of 1996 might have been the most important one: after the kidnapping and murder of four young girls, important failures of the functioning of police services and criminal justice agencies came to light, which resulted in a 'white march' of 300.000 indignant people in the streets of Brussels in October 1996. A Parliamentary Investigation Commission was established, which finally resulted in a whole reform movement including new legislation in the following years. The lack of empathy towards the plight of victims of crime and their relatives was identified as one of the main issues. Some of the outcomes of the reform process were the Law of 12 March 1998 reinforcing the legal position of victims in criminal justice proceedings, and the Law of 5 March 1998 introducing hearing and information rights for certain types of victims in the procedure of granting conditional release for prisoners, which were further extended by the Law of 17 May 2006. In this victim-sensitive climate, other initiatives and especially those related to restorative justice have also been able to flourish.[15]

Another factor of importance in the early development of restorative justice in Belgium has been the role of academics. As mentioned above, it were mainly institutes of criminology that initiated and accompanied pilot projects in the form of action-research for different types of RJ programmes. This was only possible on the basis of the long-standing relationship and cooperation that was built since the 1970s between some of these institutes of criminology and 'the field', and the leading position that experts with a degree and experience in criminology had been taken at the central governmental policy level.

It has also mainly been academics and NGOs who have introduced existing international standards in the field of victim policies and restorative justice in Belgium. Some of them had played an active role in the preparation and drafting of these standards at UN or European level, and this all might help to understand why these international instruments had a strong influence in the implementation of RJ in Belgium indeed.[16] This was the case for the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002), the Council of Europe Recommendation R(99)19 concerning Mediation in Penal Matters, and the EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (replaced by Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime). For example, the law of 22 June 2005 on mediation (for redress) was clearly inspired by the definition of mediation and the basic

15 *Daems/Maes/Robert* 2013, pp. 248-249.

16 For the impact of European regulation on the practice of mediation in general, see for example *Pelikan* 2004.

principles as put forward in Recommendation R(99)19 of the Council of Europe. The established legal frameworks for RJ in Belgium also complied with art. 10 of the EU Council's Framework Decision of 2001, in particular with § 1 on the promotion of mediation and § 2 that prescribed the possibility for the court to legally take into account the outcomes of mediation. Besides this, there has also been – maybe to a lesser extent at policy level - attention for the position of the victim in RJ processes, as dealt with by international instruments as the Council of Europe Recommendation Rec(2006)8 on Assistance to Crime Victims and EU Directive 2012/29/EU, which both in separate sections promote safeguards for victims when participating in RJ processes.

2. Legislative basis

At present, as summarised above, different types of RJ programmes – mainly victim-offender mediation and conferencing – have adopted a legal basis in Belgium. In short, restorative justice practices can be legally applied both with juvenile and adult offenders, for all types of crime and degrees of seriousness, and in all phases of the criminal justice process. In what follows, we will present the legal frameworks in more detail, as they operate throughout the consecutive stages of the criminal justice process. Since some of the legal frameworks apply to all the phases, some repetition in the overview is unavoidable.

2.1 Pre-court level

2.1.1 Adult criminal justice

Local mediation at municipal level

The laws of 13 May 1999 and 17 June 2004, most recently modified by the law of 24 June 2013, have introduced a system of municipal administrative sanctions (GAS) that allows municipal councils to adopt a local police regulation to determine penalties or administrative measures to be imposed for certain breaches of local regulations, acts of public nuisance or (a limited list of) petty offences. Possible 'sanctions' include an administrative fine (max. 350 euro for adults), the suspension or withdrawal of a licence or the closing down of a business. As possible 'alternative measures' for the administrative fine, municipalities can include in their local regulations 'community service' or 'local mediation'. A central figure in the system of municipal administrative sanctions is the 'sanctioning official', a municipal civil servant who, after an incident has been reported by a police officer or by another officially mandated person, has the legal competence to impose a fine or another sanction, or an alternative measure, as mentioned above. The alternative measure of 'community service'

(consisting of maximum 30 hours training or unpaid work for social benefit) can be proposed by the sanctioning official on the request or with the consent of the 'offender'. If the community service is completed successfully, no administrative fine can be imposed anymore. The administrative measure of 'local mediation' can be proposed by the sanctioning official on the condition that (1) its procedure and rules have been determined in a municipal regulation, (2) the offender expresses his consent, and (3) a victim has been identified. 'Local mediation' has been defined by the law as 'a measure that permits the offender, with the help of a mediator, to repair or compensate the damages, or to relieve the conflict'. The reparation or compensation is freely to be discussed and decided upon by the parties. The mediation is performed by a mediator who has to comply with minimum standards to be determined by government, or by a mediation service officially certified by the municipality according to governmental rules. If the offer of mediation has been refused, or the mediation fails, community service or an administrative fine can be imposed. When the sanctioning official decides to start a procedure, he has to inform the offender in written form about the incident and its (legal) qualification, and about his legal rights: the right to express his objections in a written form or orally, the right to be assisted or to be represented by a lawyer, and the right to have access to the file. The law furthermore prescribes the steps and timing of the procedure. Both the offender and the municipality have a right to appeal against the decision of the sanctioning official with the police court, but only regarding the administrative fines, not regarding the measures of community service or mediation. A record of all the imposed administrative sanctions and alternative measures must be kept by the municipality, consisting of elementary data about the person, the incident, the sanction, and other items.

Penal mediation

Penal mediation at the level of the public prosecutor has been introduced by the law of 10 February 1994 as the new article 216ter of the Code of Criminal Procedure (further referred to as CCP). This legal provision adds one other model to the diversionary measures available to the public prosecutor: it allows the public prosecutor to dismiss a case under certain conditions. The public prosecutor can call upon the offender and, in so far as he considers that the offence has not to be punished by a sentence of over two years imprisonment or a more severe sanction, he can request the offender to repair the damage caused by the offence and to deliver the evidence of this repair. As the occasion arises, the public prosecutor can call upon the victim and mediate about the compensation and the arrangements for it.

More precisely, the law defines four possible conditions that have to be met by the offender in order for the public prosecutor to cease prosecution. The conditions to be proposed by the public prosecutor (separately or cumulatively)

are: reparation of the damages to the victim, medical or psychological treatment for crime related personal problems, training or community service. As may be seen, reparation of the damages to the victim (including the possibility of mediation) is only one of four possible applications of this law. Therefore, as already mentioned above, the term 'penal mediation' as a title for the whole legal procedure in general is misleading.[17]

For penal mediation, there are no limits to referral on the ground of the judicial qualification of cases. Besides what is already mentioned above, other conditions to refer a case are: (1) the offender has to recognise his responsibility for the crime; (2) the offender is willing to cooperate in a penal mediation procedure; (3) the prosecution phase has not yet passed to another stage in the criminal justice process (e.g. the start of a procedure before the investigating judge or the treatment at court level). If the penal mediation procedure is completed and the offender fulfils the conditions including, if applicable, the agreement with the victim, the prosecution officially extinguishes by a formal report of the public prosecutor. If the penal mediation procedure is not completed (if the condition(s) is (are) not met), the public prosecutor is free to prosecute or to dismiss the case.

As can be noticed, the whole procedure of penal mediation occurs under the authority of the public prosecutor. However, the law (and subordinate regulation) stipulates that the case work is done by 'justice assistants', which are persons with a social work background operating under the direction of the 'Houses of Justice' within the Ministry of Justice. The justice assistant engaged in the process is also bound to professional secrecy. Participation by victim and offender in the process of penal mediation is, for each of the four measures, on a voluntary basis. They do not have a legal right of appeal against the decision of the public prosecutor to dismiss or to prosecute (in case of failure) the case after the penal mediation process.

Mediation for redress

'Mediation for redress' is the type of victim-offender mediation that initially focused on more serious crimes, and that during its experimental period was applied only after a decision by the public prosecutor was made to bring the case to court. However, since its adoption by law of 22 June 2005 it represents the

17 This was also the opinion of the Council of State in its comments on the draft law. According to the Council, the penal mediation procedure is not intended to work out an agreement between persons. Apart from that, the public prosecutor is not in the position to function as a neutral mediator, since he is a party in the judicial handling of the case. The Council of State also warned about possible confusion when, in the future, mediation on its own would be introduced, following foreign examples (*Aertsen* 2000, p. 258).

'general offer of mediation' in adult criminal law.[18] The law introduced new provisions on mediation in the Preliminary Title of the Code of Criminal Procedure and in the Code of Criminal Procedure itself, and makes mediation possible throughout all stages of criminal procedure (investigation, prosecution and trial), including the execution of sentences. The law neither specifies nor excludes certain types of offences as suitable for mediation.

The new Art. 553, § 1 CCP, stipulates that *"every person who has a direct interest can request mediation at any stage of the criminal procedure"*. Art. 553, § 2 CCP urges public prosecutors, investigating magistrates and judges to supervise the dissemination of information on the availability of mediation to the parties in criminal proceedings. This must allow victims, offenders and others with a direct interest to ask for mediation. Also, the public prosecutor or the judge can propose mediation when they judge such an offer opportune, but they can never impose it on one of the parties.

A definition of mediation is inscribed in art. 3ter Preliminary Title CCP:

"Mediation is a process that allows people involved in a conflict, if they agree voluntarily, to actively participate and in full confidentiality in resolving the difficulties that arise from a criminal offence, with the help of a neutral third person and based on a certain methodology. The goal of mediation is to facilitate communication and to help parties to by themselves come to an agreement concerning pacification and restoration."

In this definition, mediation is described as a process guided by principles such as voluntariness, confidentiality, active participation, neutral support and communication. The law does not provide a detailed and strict procedure according to which mediation must be undertaken. As stated in the explanatory memorandum, the parties themselves should determine the course of mediation. Each mediation process is unique in the sense that it reflects the individual expression and needs of the parties. In the explanatory memorandum with the law, the notions of 'pacification' and 'restoration' are presented as follows: 'pacification' aims at restoring the peace and quiet, both in relations between the parties involved in the conflict and in the relation to society. The notion of 'restoration' should be considered in its broadest sense and can include the repair of both material and immaterial losses (in the common law, both pecuniary and non-pecuniary losses).[19]

The legal framework considers mediation to be a process parallel to, but independent of, the criminal proceedings. At certain points, non-binding links are established between that process and the criminal proceedings. The mediation service can inform the prosecutor of a demand for mediation and in such a case, further ask the prosecutor for authorisation to consult the judicial

18 *Van Camp/De Souter* 2012.

19 *Van Camp/De Souter* 2012.

file (Art. 553, § 3, section 2 CCP). The results of and agreements made during a mediation process are not automatically communicated to the judge. It is up to the parties to decide whether they wish to bring any material to the judge's attention. Moreover, *if "there are elements of the mediation that are being brought to the knowledge of the judge, this is noted in the judicial decision. The judge can take these into account and if so, he notes it in his decision*" (Art. 163 and 195 CCP). Despite the possible links between the mediation process and the criminal proceedings, the confidentiality of the mediation process should always be guaranteed. This guarantee is secured by the following elaborate provisions of Art. 555 CCP:

"§ 1. The documents drawn up and the communications made within the framework of the intervention of the mediator are confidential, except for those communications to the judicial authorities upon which the parties agreed. They cannot be used in criminal, civil, administrative, arbitration or any other procedure to resolve conflicts and they are unacceptable as evidence, even as complementary judicial evidence.

§ 2. Confidential documents that are nevertheless communicated or used by a party in breach of confidence are ex officio excluded from the judicial debates.

§ 3. Except for obligations imposed by law, the mediator may not reveal facts of which he has gained knowledge in his position. He may not be called as witness in criminal, civil, administrative, arbitration or any other procedure in relation to the facts of which he gained knowledge in the course of mediation."

Mediation for redress is offered and organised by private non-profit organisations, who have set up a close cooperation with criminal justice authorities. The law of 22 June 2005, completed by a Royal Decree (26 January 2006), determines which organisations according to which criteria can be recognised by the federal Minister of Justice in order to operate as mediation services. Another Royal Decree of 26 January 2006 stipulates on the establishment of a Deontological Commission for Mediation (the organisation of mediation services is dealt with below).

2.1.2 Juvenile justice

Local mediation at municipal level

For minors, the system most recently regulated by the law of 24 June 2013 as explained above for adults, applies. However, within this legal framework further specific arrangements for minors are the following: (1) municipal administrative sanctions and alternative measures can be imposed from the age of 14 years onwards; (2) the administrative fine is limited to 175 euro; (3) the parents or legal guardian of the minor have to be informed and a special regulation for parental involvement preceding the mediation, community service or administrative fine can be adopted; (4) in all cases, an offer of mediation has

to be done by the sanctioning official; (5) the parents or guardian may, on their request, accompany the minor during the mediation; (6) a lawyer must be appointed with the help of the bar association and the lawyer can be present during the mediation procedure; (7) community service has a maximum duration of 15 hours; (8) appeal against the decision of the sanctioning official can be exercised with the youth court.

Victim-offender mediation

The reformed Youth Justice Act (YJA) of 2006 offers the legal framework for both mediation and conferencing.[20] At pre-court level, mediation can be proposed by the public prosecutor, whereas at court level the judge can refer to both mediation and conferencing (see below). The YJA 2006 sets out the overall framework of the youth justice system including the juvenile's legal rights, and contains a series of possible interventions on the young person and his/her parents after an act 'defined as an offence' has been committed by a minor (i.e. a person younger than 18 years). However, restorative options are clearly prioritised by the new Act: "mediation and conferencing are considered to be the primary responses to youth crime".[21]

Besides proposing mediation, the public prosecutor can refer the juvenile to a youth care service, issue a warning, refer to the youth court, or drop the charges. He can also refer the case to the youth court judge asking for further social enquiries. However, what is important here is to notice that the public prosecutor (as the youth judge) *has to* offer the young person, his/her parents and the victim the possibility of mediation (or, for the judge: conferencing), as soon as a victim is identified. A referral to the youth court can only be made when the offer of mediation is done or if the reasons for non-referral to mediation are explicitly explained. The parties are invited to mediation by the public prosecutor (or to conferencing by the judge) by letter, a copy of which is sent to the mediation service (which is part of an NGO in the field of juvenile assistance).

The principles of voluntary participation and confidentiality are fully inscribed in the law. If an agreement is reached, this (without proceedings) is sent to the public prosecutor (or to the judge in case of conferencing) and must be accepted by the prosecutor (or the judge) unless this would be contrary to public order. The fulfilment of an agreement does not prevent the case being brought to court (if the public dimension of the offence needs to be addressed as well). If no agreement is reached, judicial authorities and other persons are not

20 In fact, it concerns two legal initiatives: the law of 15 May 2006 and the law of 13 June 2006. For more details, see *Put/Vanfraechem/Walgrave* 2012.

21 *Put/Vanfraechem/Walgrave* 2012, p. 88.

allowed to use the process or results of mediation to the detriment of the juvenile. The implementation of the agreement is reported to the judicial authorities by the mediation service, after the parties were given the possibility to comment on the draft of the report. According to the law, a proper implementation of the agreement should be taken into account in judicial decision making.

2.2 Court level

2.2.1 Adult criminal justice

Mediation for redress

According to the law of 22 June 2005, mediation for redress can be applied at all stages of the criminal justice process, including the sentencing stage. This means that even when the case is being dealt with by the court, parties still can initiate mediation, or the judge can refer a case to mediation. No one type of crime is excluded. The same rules and principles (confidentiality and others) apply as at the pre-court level, and the mediation is organised by the same mediation service (NGOs). A written agreement or other information can only be transmitted to the court with the consent of both victim and offender. The judge can take the efforts or the results of mediation into account in his sentencing decision, but is not obliged to do so. As mentioned before, mediation for redress represents a restorative justice model that as such operates parallel to the criminal justice procedure, but that can, nevertheless, interact with the criminal proceedings by supporting or challenging criminal justice decision making.

2.2.2 Juvenile justice

Victim-offender mediation and conferencing

Here again, the same legal framework as at the pre-court level applies, namely the Youth Justice Act of 2006.[22] At the level of the youth court, both mediation and conferencing can be proposed, besides one or more other measures that can be decided upon by the youth judge (a reprimand, supervision by the youth court social service, or placement in a secure institution). Additionally, special conditions can be imposed by the youth judge regarding, for example, school attendance, training, or house arrest, and referrals can be made to programmes regarding educational guidance, community service, or engagement in a personal 'positive achievement' or a 'written project'. In a general way, the youth

22 *Put/Vanfraechem/Walgrave* 2012.

judge has to justify his/her orders and judgements extensively and - most important here - he/she must follow an order of preference, giving first priority to the restorative offer (mediation or conferencing) and second, if the former is not possible, to the juvenile's written project.

Mediation and conferencing are organised by the same juvenile assistance services as the ones that operate at the level of the public prosecutor. The procedures for referring cases to the mediation/conferencing service and for reporting back, and the implications of (not) reaching an agreement, are explained above as well (see *Section 2.1.2*).

2.3 Post-sentence level

2.3.1 Adult criminal justice

Restorative justice in prisons

Although, according to the law of 22 June 2005, mediation can also be offered – e. g. on the victim's or offender's request – during the implementation of a community sanction such as probation or community service, it has been offered in a more systematic way during the administration of the prison sentence. As mentioned above (under *Section 1.2.2*), restorative justice has gained wide attention in Belgian prisons since the late 1990s. The national programme on RJ in prisons, which appointed a RJ advisor in each prison, was regulated by circular letter of 4 October 2000 by the Minister of Justice. The objectives of this programme and the tasks of the RJ advisors (who disappeared in 2008) have been described above. In this respect, it is relevant to refer to the Belgian law of 12 January 2005 on the administration of prisons and prisoners' rights, which is based on clear penological objectives: the underlying idea is that the execution of the prison sentence must support the rehabilitation of the offender but also the restoration towards the victim.[23]

Reference has already been made to the offer of mediation during the administration of the prison sentence. After an experimental period, this type of mediation became part of the general offer of mediation according to the law of 22 June 2005. The law explicitly mentions that each person with a direct interest can request mediation also during the administration of the sentence (art. 553 § 1 CCP). The mediation is organised by the same NGOs as mediation for redress.

23 *Dupont* 1998.

2.3.2 *Juvenile justice*

Mediation, conferencing and other restorative measures

The Youth Justice Act 2006 promotes mediation, conferencing and other restorative actions by the juvenile at the preparatory phase (public prosecutor) and the court phase (youth judge). These restorative measures (and others) have been conceived for application in the natural environment of the juvenile (in a certain order of preference, see above). Placement in an open or closed institution can only be ordered by the youth judge under strict conditions. Although the law does not stipulate on the relevance or the possible use of restorative measures (mediation and conferencing) during placement of the juvenile, in practice is does not seem to be excluded.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

Mediation at the municipal level (juveniles and adults)

As mentioned above (see *Sections 1.2.3*, *2.1.1* and *2.1.2*), within the legal framework of municipal administrative sanctions (GAS), mediation can be applied by way of response to different forms of anti-social behaviour, both for juveniles and adults (it *must* always be offered for minors). It is usually a municipal civil servant who will organise the mediation in a practical way, besides other measures he/she can apply. There is no one uniform system of mediation available, since all municipalities are free to adopt their own model, according to their local regulations and taking into account the legal framework. One important observation is that this type of mediation is also used in cases of victimless crime, or when there is no personal victim, for example in the case of vandalism or damages to public infrastructure (making water is a typical example) or shoplifting. In such mediation cases, the victim's role is often played by a representative of the public service or private company, or the 'mediation' takes place between the offender and the sanctioning official. The outcome can be financial restitution, offering apologies or performing services for the victim or the victimised institution. In some cases, in order to implement this type of mediation, (smaller) municipalities are offered support (staff) by the province government.

Mediation under the Youth Justice Act (juveniles)

The Youth Justice Act 2006 resulted in officially establishing and expanding the organisational framework and procedures for both mediation and conferencing as they have been developing as pilot projects since the 1990s (see above *Sections 1.2.1*, *2.1.1* and *2.2.2*). Both models of restorative justice for minors are now available all over the country, i.e. in each judicial district.

Cases suitable for mediation are mainly identified at the offices of the public prosecutor and – to a lesser extent – the youth judge. Victim and offender – and in case of a minor also his parents – are invited to mediation by a letter from the public prosecutor or the youth judge. Herein, the parties are asked to enter into contact with the local mediation service, which is part of an NGO active in the field of youth assistance. These NGOs are officially recognised and fully subsidised for this work by respectively the Flemish Community and the French Community or Walloon Region. The mediation process is guided by a staff member – the mediator – of the NGO. The mediators are all professionals (full time or part time employed and paid by the NGO), their background being mostly that of social worker, educator or criminologist. Only in one judicial district (Leuven) a group of volunteer mediators operates within the local mediation service, as they are coached by the professional mediators. The mediators all receive initial and ongoing in-service training and all work in team.

The mediation itself follows a structured process, starting with individual talks and eventually home visits to both parties separately, followed by a face-to-face meeting in more or less half of the cases. When there is an agreement reached between the parties, this will be sent to the referring judicial authority together with a limited written report by the mediator.

Penal mediation (adults)

Penal mediation as legally introduced in 1994 is offered by the so-called justice assistants from within the public prosecutor's office and is available in each judicial district (see *Sections 1.2.2* and *2.1.1* above). This type of mediation is applied as a diversionary measure in cases of relatively minor crime, for which the public prosecutor would not require a penalty of over two years of imprisonment. The cases are selected by the public prosecutor, after which the parties are contacted by the justice assistant and the mediation process and/or the other measures are carried out. The mediation process often focuses indirectly (not face-to-face) on the financial/material reparation, but also a dialogue including explanation of what happened and apologies can take place. At the end of the mediation process, the justice assistant will report to the public prosecutor and in the positive case (completion of the agreement and/or the other conditions) the file will be dismissed officially. In case of non-completion,

the public prosecutor can continue the procedure, but is not obliged to do so (he still may dismiss the case).

The mediators (justice assistants) are in fact probation workers. As civil servants they operate under the Directorate-General Houses of Justice (Ministry of Justice) and locally they are part of the house of Justice, which exists in each judicial district. However, according to the current State reform process in Belgium, the DG Houses of Justice will be brought under the competence of the Communities in 2014. This means that soon all the justice assistants will be civil servants no longer under the federal ministry of Justice, but under the Flemish respectively French Community. This will be the case not only for their mediation tasks, but also for all other legal duties the justice assistants have in the broad field of non-custodial sanctions and measures.

Justice assistants, also those specialised in penal mediation, are usually social workers. They receive their training (in mediation) within the DG Houses of Justice.

Mediation for redress (adults)

Contrary to 'mediation at the municipal level' and 'penal mediation', 'mediation for redress' as initiated in 1993 and finally established by law in 2005, can be offered during all phases of the criminal justice process, including the execution of the (prison) sentence, and for all types of crime independent of their nature and degree of seriousness (see *Sections 1.2.2, 2.1.1, 2.2.1* and *2.3.1* above). Therefore, mediation for redress is the restorative justice model in Belgium with the widest scope of application. It is available throughout the country, in each judicial district. Two NGOs are responsible for the local organisation of mediation for redress: Suggnomè in the Flemish Community and Médiante in the French Community. Both organisations are officially recognised for this task by the federal ministry of Justice, and fully subsidised by this authority as well. However, according to the current State reform process, also this type of mediation including its funding will be brought under the competence of the Flemish respectively French Community in 2014.

As already stated, cases for mediation for redress can be selected at all stages of the criminal justice process. According to the law, all parties with a possible interest in mediation must be informed about this offer by the police or judicial authorities. In practice, however, most cases are identified at pre-sentence level, within the public prosecutor's office. From there, files are referred to the local mediation service (which operates under the NGO Suggnomè or Médiante), after a letter has been sent out by the public prosecutor to victim and offender. In this letter, the offer of mediation is explained, and information is given on how parties can contact the mediation service. Depending on local arrangements, it is sometimes the mediation service who takes the initiative to contact the parties.

The mediation process itself runs in the following structured way: first the mediator talks separately to victim and offender, often by way of home visits. In this phase, the mediator starts an indirect communication between victim and offender, which can result in a direct, face-to-face meeting (which only takes place in approximately 30% of the cases). The focus of this type of mediation - also because of the often more serious nature of the crime - is very much on the non-material aspects and the dialogue between parties. Most important seems to be asking for, and explaining the reasons and circumstances of the crime, the background of the offender(s) and why the offence happened, on the one hand, and clarifying the consequences of the crime for the victim and his surroundings, on the other hand. These non-material elements, eventually together with a financial settlement, can be included in a written agreement between victim and offender (which happens in almost 50% of the cases). The drafting of this agreement is facilitated by the mediator, who, after explicit consent by both victim and offender, can send the agreement to the referral body (mostly the public prosecutor). If one of the parties does not agree with the communication of the agreement (or an information on the lack of agreement) to the referral body, then the mediator is legally spoken not allowed to do so. The latter is to be considered as a formal requirement related to the principle of confidentiality in mediation, also vis-à-vis judicial authorities. If the judicial authorities are informed, then the agreement (or the lack thereof) can, but does not necessarily, influence the further decision making process by public prosecutor and judge.

As mentioned before, 'mediation for redress' is offered by two NGOs which operate in an autonomous way, but in close cooperation with judicial authorities. Their local mediators, present in each judicial district of the country, are (part time or full time) paid employees on the basis of subsidies received from the ministry of Justice. The mediators have a university degree (often criminologists), and they receive their initial and ongoing training within their organisation. The full salary and operational costs are covered by the subsidies of the ministry of Justice.

Of interest is the type of organisation of the services for mediation for redress. They are managed by local partnerships at the level of the judicial district. These formal partnerships are composed by representatives from the municipality, the house of Justice, victim support, the local police, the public prosecutor, the court, the bar, the prison and, if available, a research or academic institution. In some districts, also the juvenile mediation scheme and other restorative justice initiatives are included in this partnership, in order to better support and guide the implementation of restorative justice in a coordinated way. This multi-agency model is founded on a written 'protocol' of co-operation, signed by all partners, in which the general aim and objectives of the partnership and the respective responsibilities are stipulated.

3.2 Conferencing (juveniles)

When the youth judge is considering a conference (according to the legal framework, see *Section 2.2.2*), he will usually first ask for advice from the youth court social service. After a positive advice, the juvenile court can refer the case to the local NGO for youth assistance which is also responsible for victim-offender mediation (see above, these are the same NGOs, as they are recognised and subsidised by the Flemish and French Communities). Within the NGO, a facilitator ('moderator') starts working on the case. He will first examine, during preparatory meetings with the parties separately, if conferencing is possible. As a first step, the facilitator will determine, during a home visit, whether the offender is willing to cooperate. If this is the case, the facilitator will discuss which support persons the juvenile and his parents would like to bring to the conference. If the juvenile is not prepared to participate, the NGO will inform the youth judge within 48 hours. If the juvenile is willing to participate, the victim will be contacted and also he/she can bring support persons to the meeting. If the victim is not prepared to participate, he/she can be involved through writing a letter with regard to the consequences of the offence and his/her expectations, or the victim can be represented by another person or by a victim support worker.

The conference itself is guided by the facilitator (sometimes two facilitators) along several phases without following a pre-defined script. Usually also a police officer attends the conference, in order to represent the public interest. He/she will start by reading the official police report, explaining what the offence was about. Then, the victim, the offender and the persons who support the parties are given the opportunity to tell their story and to ask questions, with the intention to come to an agreement. The facilitator tries to ensure that all the parties communicate with each other in a direct way. If necessary, he/she can structure and summarise the conversation but only to keep the clarity for all the parties. The goal of the conference is to come to an agreement or a plan, in which the juvenile (and other persons) commit themselves to repair the damages and/or to undertake specific actions. In order to draft the plan, often a 'private' phase is included in the meeting, where the parties discuss their ideas separately, before exchanging them with the other party in the plenary meeting again. When the parties come to an agreement, this will be sent by the facilitator to the juvenile court, where the juvenile court still has to give his approval (what usually happens effectively).

As mentioned above, the conference facilitators are staff members of the youth assistance services that also employ the mediators. Due to the limited number of conferences carried out (*see below*), the same persons are acting as mediator or as conference facilitator depending on the case. The facilitators have the same educational and professional profile as the mediators; they are often social workers who receive specific training on conferencing within their organisations. At some places (Leuven), volunteers have been involved in the conferencing process in order to support one of the parties.

3.3 Specific types of reparation

Compensation Fund (juveniles)

As mentioned above (*Section 1.2.1*), a compensation fund for juveniles and their victims was established in 1991 and became operational in the Flemish part of the country.[24] When, during mediation, it appears that the young offender has no financial resources to reimburse the victim, instead of asking his parents to come up for the damages, he/she is given the opportunity to do some voluntary work for a non-profit organisation, for which he/she is paid by the fund. Then, the juvenile will hand over his earnings to the victim. The fund is sponsored by private donors on the one hand, and by province governments on the other. This way, the community is involved, not only by making means available to the offenders and the victims and by creating opportunities for voluntary work, but also by the operation of a committee that handles the requests for intervention by the compensation fund.

Young offenders can apply to the fund under certain conditions and in the following way:

- The juvenile offender admits having committed a criminal offence;
- The young person is willing to pay compensation;
- The juvenile has issued an agreement with the victim reached after mediation;
- Together with the victim he/she examines how the compensation can be paid;
- The fund only intervenes for the damages that are not covered by a private insurance;
- The young person writes a letter to the committee of the compensation fund where he/she motivates his/her request;
- The members of the committee decide whether to approve the application; the committee takes into account the personal motivation of the applicant, the opinion of the parents, the expectations of the victim and the position of the mediator.

If the application is approved, the juvenile himself needs to look for work that is voluntary, possibly with the assistance of the mediator. When he/she finds a suitable organisation, the necessary arrangements will be made in terms of

24 The Dutch name is 'Vereffeningsfonds'.

working days and hours and specific tasks. The whole arrangement is laid down in an agreement to be signed by the parties.

The whole process of making use of the compensation fund is supported by the mediators of the NGOs in the field of juvenile assistance as referred to above. The compensation fund operates on the basis of local arrangements at the level of the provinces and is not regulated by law.

3.4 Restorative measures in prisons

Compensation Fund for prisoners

A similar compensation fund as for minors exists for adult convicted prisoners (post-sentence) and their victims in the Flemish part of the country.[25] The same principles apply and the voluntary work, in this case, is done within the prison on behalf of external non-profit organisations. In some case, the voluntary work can be done outside the prison. The project is run by the Flemish NGO Suggnomè (responsible for mediation for redress) in cooperation with the federal ministry of Justice, the provinces and services for social work. Also for this fund, a committee has been established to evaluate the applications by prisoners, which take place in the context of a mediation process with their victims. Also this fund is not formally regulated by law.

4. Research, evaluation and experiences with restorative justice

4.1 Figures

Integrated statistical data covering all restorative justice programmes in Belgium do not exist. We have to rely on the data as they are collected by the respective organisations at federal or regional level and as they are presented in their annual reports. In a few cases, overview studies have been made for certain programmes over a longer period of time. In what follows, we present a compilation of figures as we have been able to compose on the basis of the above mentioned sources. The figures as mentioned below cannot easily be compared between restorative justice programmes, since the counting criteria can differ: for example, depending on the programme, 'cases' are counted on the basis of the number of offenders involved, the number of victim-offender relations, or the number of judicial files.

25 Dutch name is 'Herstelfonds'.

Mediation at the municipal level

Some figures on the application of mediation at the municipal level (within the GAS system) are provided by the federal government which subsidises the employment of local mediators in some cities (27 mediators in 2010).[26] In 2009, these mediators dealt with 3,799 cases. In 42% of the cases parties agree to start mediation, after which 74% reaches an agreement. The agreement can contain apologies and personal reparation towards the victim, but also all kinds of unpaid work and tasks for public services. In only 20% of the cases, the offender involved in this type of mediation is a minor.[27]

Victim-offender mediation with juveniles

As can be read in *Table 1*, the total number of mediation cases in the field of juvenile assistance in Flanders fluctuates around 3,000 to 4,000 per year.

Table 1: Number of cases referred to mediation with juveniles in the Flemish Community (2005-2012)

2005	2006	2007	2008	2009	2010	2011	2012
1,620	2,147	3,449	4,349	4,050	3,770	3,998	3,244

The caseload for local mediation services varies from approximately 100 to 600 cases per year.

Most young offenders in mediation are male (almost 90%) and most of them (about 75%) are between the ages of 14 and 17. About 30% of the offenders are of non-Belgian ethnic origin. About 75% of the victims involved in mediation are physical persons, of which two thirds are men; about 25% of the victims are legal entities (public institutions, shops or companies). The main types of offences included in mediation are physical assault (around 25%), damages/vandalism to properties (about 25%), theft (about 30-35%) and shoplifting (about 4%). Around 90% of all mediation cases are referred by the office of the public prosecutor, around 10% by the youth judge. Of all referred cases, in around 50% the mediation process is not started after a first contact with one or both parties; in 40% the mediation process is totally run, of which

26 These 27 mediators are also offering services to neighbouring municipalities and therefore have a much wider reach than just 27 cities. But the figures mentioned here do not present a complete picture for the whole country, since in many municipalities this type of mediation is done by non-subsidised local civil servants.

27 *Opfergelt* 2012.

the majority (80%) also reaches an agreement with the victim. This agreement is almost always fully complied with by the juvenile (90-95%). Direct mediation (face-to-face) is only done in a minority of the cases (around 20-30%, with considerable fluctuations over the years); most cases are dealt with through indirect communication (shuttle mediation).

For the French Community, about 1,500 cases per year are referred to the mediation services, of which about 80% are selected by the office of the public prosecutor and 20% by the youth judge (figures for 2011). This means that for Belgium the total annual number of mediation cases with juvenile offenders is about 5,500 (at least for 2011).

Conferencing with juveniles

The total number of cases of conferencing remains rather limited, despite the legal framework that was created in 2006. The total number of conferences referred to all services together in the Flemish Community ranges from 44 (2007) to 114 (2009) and 108 (2012). The big majority of offenders in conferencing is male (96%, for Flanders, 2010) and 75% of them is age 15-17. The nature of the offences involved in conferencing is more serious than in mediation: these are (for Flanders) mainly acts of theft with violence, armed robbery, physical assault and blackmailing. Of all cases referred by the youth judge for conferencing, only 25% results in a conference effectively (figure for 2010; this was higher for the previous years). The main reason why a conference is not started is the lack of interest or willingness from the side of the victim. When a conference is taking place effectively, it almost always ends in an agreement or an 'intention declaration' by the juvenile. In 17% of the conferences no victim participates, and in 37% there is no additional support person for a participating victim; in almost all cases one or both parents of the juvenile offender is present and in about 50% of the cases another family member or support person for the offender participates as well; a police officer is present in 92% of the conferences, a lawyer in 82% (figures for Flanders, period 2007-2010).

For the French Community a total of 145 cases was referred to conferencing in the period 2007-2010; the number was 45 in 2011, for which in total 25 victims were involved. In all cases, 55% of the victims agreed to participate. Most cases included violent offences (70%) and in 60% of the cases the offence was committed in group. Most of the juveniles involved in conferencing are first offenders of Belgian origin and have a relatively stable family and school background.

Penal mediation (adults)

Yearly, around 6,000 cases in Belgium apply for penal mediation. The year 2011 accounted for 6,732 referred files. Most penal mediations involve property crime (30% in 2011) or violent crime (47% in 2011). Similar percentages are found throughout the years.

Table 2: Number of cases referred to penal mediation in Belgium (1995-2011)

1995	1997	1999	2001	2003	2005	2007	2009	2011
5,393	6,765	6,583	6,012	6,107	6,377	6,304	6,616	6,732

Among the participants in penal mediation, the majority of offenders (82%) is male, while almost as much males (44,6% in 2011) as females (41,1% in 2011) appear on the victim's side (the remaining percentage concerns legal entities). Most penal mediations are cases with only one victim involved (67,7% in 2011). In 2011, around 15% of cases had no (identified) victim, 11% had two victims and 3% had three.

In 2011, of the 6,133 that actually started penal mediation, 2,755 (or 45%) were discontinued during the mediation process. An equal number (2,704 or 44%) was successful, while 434 (or 7%) of the mediation cases failed. A successful mediation almost always results in a discontinuation of the criminal proceedings (92.8% in 2011). The mediation cases that are discontinued at one point or the other during the mediation process result in a dismissal of charges (23.1% in 2011), prosecution (26.5% in 2011) or are forwarded to the competent magistrate for information purposes (37.9% in 2011).

The above mentioned figures refer to the whole package of interventions under the legal title 'penal mediation' at the level of the public prosecutor. This means, only part of these figures concern mediation between victim and offender in the proper sense of the word. Of all cases selected by the public prosecutor for 'penal mediation' (around 6,000 per year), around 35-40% results in mediation (direct or indirect) with the victim.[28] In the other cases of 'penal mediation', a measure of therapy for the offender is applied (10-15% of the cases), community service (up to 20%) or training (20-25%).[29] These measures can be combined as well. According to our estimation, mediation with the victim

28 Higher percentages (up to 60%) are mentioned in some sources.

29 'Mediation' in penal mediation in many cases has to be considered as a process of negotiation, with the help of the justice assistant, between the public prosecutor on the one hand, and the offender on the other.

in the context of 'penal mediation' takes place in no more than 4,000 cases per year, for the whole country.

Mediation for redress (adults)

1) Flemish Community

At present, mediation for redress accounts for some 2,000 requests annually, of which in about 90% of the cases mediation is started effectively (*Table 3*).

Table 3: Number of cases referred to and started by mediation for redress in the Flemish Community (2002-2012)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Referred	394	432	639	857	948	858	1,232	1,329	1,316	1,860	2,065
Started	251	303	548	642	823	746	1,104	1,191	1,196	1,685	1,882

In 2012, for the 1,882 cases started, in total 5,187 persons were informed about the offer of mediation (2,991 victims and 2,196 offenders), of which 3,051 persons were interested effectively. This finally resulted in 1,233 mediation files where both victim and offender were interested in mediation and whereof finally in 963 cases both parties participated in mediation effectively. In 22% of the cases (in 2012), victim and offender had a family relationship. In 38% of the cases, the offence concerned a violent crime, in 32% a property crime. Violent crimes include rape and murder cases. In about 40% of the concluded mediation files, an agreement is reached between victim and offender. In about 25% of all concluded mediation files (in 2012), a direct mediation (face-to-face) takes place. The other cases are done indirectly. For the years 2002-2011, the proportion of direct mediation in the total number of cases ranged from 10 to 25%. This means that the overwhelming majority of all cases in mediation for redress concern indirect mediation.

Over all the years, most victims are informed of the offer of mediation for redress by the office of the public prosecutor or by the mediation service itself. Most of the concluded cases are handled during the criminal investigation phase (pre-trial). This is a persistent trend since 2006. However, it must be noted that more and more cases are also being dealt with in the phase of the administration (execution) of the (prison) sentence: 45 cases in 2006, rising to 163 cases in 2011.

Among the participants, the offender seems to be mainly of male gender (about 90% of the cases for the consecutive years), while almost as many males as females appear on the victim's side. Most victims are between 30 and 50 years old, while most offenders are either between 18 and 25, or between 30 and 40 years of age.

The written agreements deal with compensation for material damages in the majority of the cases, but also non-material elements are often included: in most cases some kind of expression of sorrow or offering of apologies is made. Other elements that sporadically appear in the agreements are: the start of therapy (for the offender), the promise to avoid contact with each other, and the appreciation of the mediation process. In 2011, about 15% of participants noted their own point of view in the agreement.

The average duration of a mediation runs between 117 and 139 days, starting with the showing of interest and ending with an agreement.

2) French Community

The number of requests for mediation for redress in the French speaking part of the country has almost doubled between 2006 and 2011: from 637 cases in 2006 to 1,121 in 2011. The number of actual performed mediations rose from 412 in 2006 to 779 in 2011.

Table 4: Number of cases referred to and started by mediation for redress in the French Community (2006-2011)

	2006	2007	2008	2009	2010	2011
Referred	637	827	1,096	1,316	1,379	1,121
Started	412	538	822	897	923	779

More than in the Flemish part of the country, mediation cases in the French Community are referred in the post-sentence phase. In 2011, 45.7% of all cases was referred during the administration of the prison sentence, and 9% during the phase of remand custody.

Whereas in the late 1990s the number of offenders in mediation was always (slightly) higher than the number of participating victims, in 2003 and 2004 participating victims outnumbered the offenders (278 to 179 in 2003, and 452 to 337 in 2004) (no figures are available for the years thereafter).

If the offender does not spontaneously ask for mediation (328 times in 2011), the most common sources to refer to mediation are: probation services (146 times in 2011) or internal prison services (126 times in 2011). A victim can be referred to mediation by the house of Justice (32 times in 2011). However, most requests come from the victim him/herself (53 times in 2011).

Going back to charts from 2003, 59.7% of all mediation cases ended in an agreement, containing details on material reparation (10%), relational redress (22%) or commenting on the usefulness of the conversation (68%).

4.2 Research and evaluation

Both theoretical and empirical research on restorative justice has been carried out in Belgium since the early 1990s. Many of the studies and projects were initiated from within the University of Leuven (Leuven Institute of Criminology), but the universities of Brussels, Gent and Liège also contributed various projects in the 2000s. In what follows we list the most important research projects, without having sufficient room to be exhaustive or to go into detail. We are only presenting the completed research projects, knowing that various studies are still going on at this moment (end of 2013). We also cannot deal with the numerous master theses of students in criminology and other disciplines who have studied specific aspects of mediation or other restorative justice practices in Belgium. Finally, we only include projects specifically on Belgium, excluding the various European or international projects in which Belgium has been a partner since the late 1990s.[30] For this reason, also the European FP7-project ALTERNATIVE, coordinated by the University of Leuven, is not presented, and the same applies to *Restorative Justice: An International Journal*.[31]

Theoretical research and PhD projects

A joint doctoral research project on 'The development of a theoretical frame for restorative justice from an ethical and social perspective' was carried out by *Johan Deklerck* and *Anouk Depuydt* (2000-2004), who focused on two main

30 For the international and European projects where Belgium was a partner, we refer to the information on the website of the European Forum for Restorative Justice (http://www.euforumrj.org). European projects have been dealing with, for example, the position of the victim in restorative justice practices, the role of desistance of crime in restorative justice, and the applicability of restorative justice to cases of sexual violence. For a complete overview of research projects carried out at the Leuven Institute of Criminology, see: 'Restorative Justice related research at the Leuven Institute of Criminology, 2000-2013' (http://www.law.kuleuven.be/linc/onderzoek/LINC_RJ_-Research_Brochure_2013.pdf).

31 The FP7-project ALTERNATIVE (2012-2016) examines in a partnership of seven research institutes from six countries both theoretically and empirically how through restorative justice processes new understandings of 'justice' and 'security' can be developed (http://www.alternativeproject.eu). Restorative Justice: An International Journal was launched in early 2013 on the initiative of the Leuven Institute of Criminology, from where also the coordination is done (http://www.hartjournals.co.uk/rj).

research questions: (1) In which way can 'linkedness' be an ethical frame of reference for processes of restorative justice between victim and offender? (2) In which way can 'integration-disintegration' be a model for the analysis and the orientation of processes of penal change towards the principles of restorative justice?[32] A post-doctoral research project by *Erik Claes* dealt with 'Punishment and sentencing in a constitutional democracy' (2005-2009), and aimed at elaborating a coherent normative theory of criminal punishment that (1) could offer sufficient guidance for sentencing practices; (2) help define the role of the judiciary power in relation to other institutional actors (including restorative justice practitioners).[33] From within the Belgian research scene, *Lode Walgrave* might be best known as restorative justice scholar internationally. Most of his theoretical insights are presented in his book 'Restorative justice, self-interest and responsible citizenship' (2008) where he developed a maximalist conception of restorative justice based on an outcome-oriented definition and presenting restorative justice as a fully fledged alternative to the punitive apriorism.[34]

Both theoretical and empirical research have come together in a series of doctoral research projects at the universities of Leuven, Brussels, Gent, Liège and Maastricht. For Leuven, the doctoral project by *Ivo Aertsen* (1996-2001) can be mentioned, in which he focused on a theoretical elaboration of a procedural model of restorative justice, as applied to victim-offender mediation for more serious crimes.[35] *Inge Vanfraechem* carried out her PhD research on the applicability and evaluation of a model of family group conferences in Flanders (2000-2004).[36] At the university of Brussels, *Ann Raes* in her PhD project studied 'penal mediation' and 'penal transaction', in particular the extent to which the participatory, consensual and negotiated aspects led to a communicative model of justice different from the classic, horizontal criminal justice process.[37] *Katrien Lauwaert* obtained her PhD from the University of Maastricht with her dissertation on 'Procedural Safeguards in Restorative Justice', dealing with legal principles such as the presumption of innocence, proportionality and legal assistance on the one hand, and restorative justice principles such as neutrality, confidentiality and voluntariness on the other hand; for this project, she carried

32 *Depuydt/Deklerck* 2005.

33 *Claes/Foqué/Peters* 2005.

34 *Walgrave* 2008; see also, amongst many other publications: *Walgrave* 2000; 2002; 2003.

35 *Aertsen* 2004.

36 *Vanfraechem* 2005; 2007; *Vanfraechem/Harris* 2003; *Vanfraechem/Walgrave* 2004b; *Vanfraechem/Lauwaert/Decocq* 2012.

37 *Raes* 2006.

out empirical research on 'mediation for redress' in Flanders.[38] A comparison between mediation for young and adult offenders from the perspective of social work practice formed the subject of a PhD by *Lieve Bradt* at the University of Gent (2005-2009).[39] *Vicky De Mesmaecker* for her PhD project in Leuven (2007-2011) focused on 'Perceptions of justice and fairness in criminal proceedings and restorative encounters' for both victims and offenders, aiming at investigating the relationship between restorative justice and procedural justice theory.[40] *Daniela Bolivar*'s PhD research (2007-2012) studied the victim's experience of 'restoration' when participating in victim-offender mediation, for which she undertook empirical research both in Belgium and Spain.[41] From her side, *Tinneke Van Camp* did empirical research on victim-offender mediation and conferencing both in Belgium and Canada for her PhD project at the Université de Montréal; she examined which factors besides procedural justice contribute to victim satisfaction with restorative justice.[42]

At the University of Liège, *Christophe Dubois* carried out his PhD research on the functioning of restorative justice and the restorative justice advisors in four Belgian prisons from a sociological perspective.[43] An ethnographic approach was used by *Bart Claes* when investigating for his PhD at the Free University of Brussels the notion of 'restoration' within the social life of the Central Prison of Leuven.[44] At the University of Gent finally, *Nikolaos Stamatakis* defended his PhD on the perception of restorative justice by prisoners, drawing on some historical and religious roots of restorative justice, and on the basis of a quantitative empirical study in several prisons across Belgium.[45]

Empirical research

An overview of empirical research on restorative justice in Belgium has been presented in 2010 by *Van Doosselaere* and *Vanfraechem* by way of national report in a compilation of overviews from nine European countries.[46] The

38 *Lauwaert* 2008.

39 *Bradt* 2009.

40 *De Mesmaecker* 2011; *De Mesmaecker* 2014.

41 *Bolivar* 2011; *Bolivar* 2012.

42 *Van Camp* 2011; *Van Camp/Wemmers* 2013.

43 *Dubois* 2011.

44 *Claes* 2012.

45 *Stamatakis* 2013.

46 *Van Doosselaere/Vanfraechem* 2010; *Vanfraechem/Aertsen/Willemsens* 2010.

authors distinguish between descriptive-inventory research, action-research and evaluative research.

Descriptive-inventory research has been done, for example, in a joint research project by the universities of Brussels, Gent and Leuven on behalf of the Flemish government on various restorative justice practices with juveniles in Flanders, including mediation, community service and educational projects. The 'restorative' character of these practices was looked at, as well as the type of cases and organisational models, against the background of a (developing) theoretical concept of restorative justice.[47]

Belgium has an interesting tradition of action-research in the field of restorative justice. *Van Doosselaere* and *Vanfraechem* (2010) present several projects, starting from the late 1980s onwards:

- an experimental project and an evaluative project on mediation with juveniles in the French Community assessing the possibility of entrusting community service organisations (usually working with offenders) with carrying out victim-offender mediation;[48]
- the action-research on mediation for redress in Flanders in the period 1993-1996, with the goal to develop a model of mediation for more serious crimes on the one hand, and to study its relationship with the criminal justice process on the other hand;[49]
- the action-research on implementing restorative justice in the prison (1998-2000), resulting in the appointment of restorative justice advisors in all Belgian prisons;[50]
- the action-research on conferencing in Flanders (2000-2003), where a model of family-group conferences was tried out in several judicial districts with a view of wider implementation afterwards.[51]

Because of its innovative character, a European action-research project on peacemaking circles (2011-2013), in which Belgium was involved, must be mentioned especially. In this project, coordinated by the University of Tuebingen (Germany), a model of peacemaking circles was developed that has to fit a European legal and cultural context. A limited number of peacemaking circles (30 in total) were realised in Belgium, Germany and Hungary. In Belgium, the action-research was done by the Leuven Institute of Criminology in cooperation with the NGO Suggnomè. The practice has shown that peace-

47 *Van Dijk/Van Grunderbeeck/Spiesschaert/Vanthuyne* 2002.

48 *Scieur/Van Duüren/Van Duüren* 1991; *Billen/Poulet* 1999.

49 *Aertsen* 1999; 2000; *Peters/Aertsen* 2005; *Van Garsse* 2001.

50 *Robert/Peters* 2003; *Aertsen* 2005; 2012.

51 *Vanfraechem* 2003; 2004b; 2005.

making circles can be used effectively, but important challenges relate to the development of a method on how to involve members of the wider community. The project resulted in an extensive report and a manual on the implementation of peacemaking circles.[52]

Evaluative research on restorative justice practices has been done on various topics and was often part of the aforementioned PhD and other projects. High satisfaction rates for victims and offenders have been found in various studies, together with high compliance rates after reaching an agreement. Victims' and offenders' experiences of the mediation process and their perception of the mediator's role have been included in several studies, but also - for example - perceptions of 'justice' and 'restoration' after a mediation experience. However, these research projects usually did not adopt an experimental design, and rather focused on the assessment of experiences, practices and programmes as they could be observed in their daily functioning. How restorative justice *programmes* have been evaluated, might be shown by the following three examples:

- An evaluative research on the Flemish compensation fund for juvenile offenders (see above *Sections 1.2.1* and *3.3*) entailed three elements: a study of the institutional position of the compensation fund; observation and description of the functioning of the fund; and an inquiry on the satisfaction and general experience of victims, offenders and relevant third persons, including their experience with the accompanying mediation process.[53] Interviews with those involved revealed positive attitudes towards the model of the compensation fund and high satisfaction rates with the process of mediation. Moreover, victims' and offenders' opinions were asked about the origins of the financial support for the fund, and the further (judicial) handling of the case after mediation.
- Mediation at the police level (see *Section 1.2.2*) has been evaluated aiming at: a clarification of the objectives, the institutional link and the organisational framework of this type of mediation and specifically its relation with 'penal mediation' at the prosecutor's level; an analysis of the mediation practices as developed by the respective projects at the police level; an exploratory study related to the satisfaction of the parties, the way mediation at the police level is perceived by the public and the follow-up of the offenders.[54]
- Evaluative research has been done on the (reasons for the) limited application of the conferencing model for juveniles, although this restorative justice practice together with mediation has been prioritised by the new juvenile justice act of 2006. Figures for Flanders for example showed that in the period 2007-2010 only 335 juveniles had been referred to conferencing, of which 118 juveniles (35%) finally started a conferencing process.[55] In Wallonia in the same period of four years, only 145 cases were referred to conferencing. The evaluation in Flanders revealed, for example, the existence of considerable differences between the judicial districts in terms of number of cases referred to conferencing and the motivation and involvement of youth justice social services. Nevertheless, there seems to be a strong consensus in the work field on the added value of conferencing and the possible effects of the meeting with the victim. Obstacles for referring cases to conferencing related to the complex nature of the selection process, the time- and labour intensive nature of conferencing, and the simple fact that many cases had already been referred to mediation. Moreover, not all actors in the judicial field seem to be sufficiently informed about the applicability and characteristics of conferencing, and youth judges sometimes allocate different objectives to conferencing.[56] In Wallonia the same disparity in the limited application of conferencing between judicial districts was found. Moreover, until today youth judges in that part of Belgium show more resistance towards restorative justice approaches. They are more in favour of a protective model of youth justice and they are afraid of losing control over their files. The confidential nature of restorative justice processes worries them, and in several locations the cooperation with external restorative justice programmes (NGOs) hampers. In short, there seems to be a discrepancy between how restorative justice processes are conceived in the law and are given priority in theory on the one hand, and their practical application in reality on the other hand.[57]

Some of the above mentioned obstacles have also been found in a larger research project on the practice of victim-offender mediation for juveniles in Flanders and Brussels.[58] For the whole of Flanders and Brussels, 2.9 juvenile

52 *Ehret/Dhondt/Szegö* 2013; *Fellegi/Szegö* 2013.

53 *Stassart* 1999; *Van Dijk et al* 2002.

54 *Lemonne/Aertsen* 2003; *Aertsen* 2009.

55 The main reason for the non-starting of a conference was the lack of interest or willingness from the side of the victim (in 67% of the non-started conference cases). But, once a conference was started, 92% of the cases resulted in an agreement or 'intention declaration', and 64% of the intention declarations was complied with totally. In 17% of the conferences started, no victim was present, whereas in 92% of the cases a police officer attended the conference.

56 *Bradt* 2012.

57 *Dachy* 2013.

58 *Fekwerda/van Leiden* 2012.

offenders per 1,000 juvenile inhabitants (i.e. under age 18) are referred to victim-offender mediation on an annual basis. One out of five victims involved in mediation is a legal person (shop, institution, ...). On average, the period between the offence and the referral to mediation is six months. Direct (face-to-face) mediation is only applied in about 25% of all cases, for which both characteristics of the mediator (practical approach, experience, perseverance) and the parties (non-interested victims) seem to be responsible. Personal experiences of victims and offenders on various topics have been investigated in this research, as well as opinions and experiences of legal and social practitioners. At the organisational level it seems that, notwithstanding what is prescribed by law, mediation is not always considered by the judicial actors; here again important differences exist between judicial districts. The flow into mediation processes is, in practice, extremely vulnerable because of practical and administrative circumstances at court level, lack of staff, and personal opinions.

5. Summary and outlook

Belgium is one of the countries where restorative justice has found fertile soil. It is one of the few countries worldwide where restorative justice is available for all types of crime, at all stages of the criminal justice process, for both minors and adults, and for crimes of all degrees of severity. Moreover, restorative justice is well established by law, available throughout the whole country and relatively well funded by federal and regional governments. The landscape, however, is divided: there are (too) many different victim-offender mediation models, which does not contribute to transparency for the users of the programmes, and which prevents proper and efficient coordination of services, integrated policymaking at national level and continuous growth.

Because of the absence of an integrated national data recording system for all types of restorative justice programmes, we can only make a realistic estimation of the total number of cases dealt with annually: it concerns about 13,500 mediation cases and about 150 conferences per year. Although the number of mediation cases might seem rather large for a small country (with a population of less than 11 million), it is also clear that the potential of mediation and conferencing is far under-used. We lack a reliable system on how to calculate the potential in a quantitative way, but observations in the field and various research reports reveal the presence of important obstacles to refer cases to restorative justice programmes in an effective and efficient way. Restorative justice in Belgium cannot yet be considered to be a service to which all persons involved in or affected by crime have equal access. This is an important limitation, notwithstanding the legal frameworks which, for juveniles, stipulate that mediation and conferencing have to be considered systematically and by priority, and which, for adults, determine that all persons with a possible interest in mediation must be informed about the offer systematically.

In a more general way, we are confronted – to a certain degree – by a discrepancy between 'law in the books' and 'law in action'. In the field of restorative justice, there is a lot of intellectual work being done in the country, and a lot of theoretical and other research is available. Legislation, although spread over various frameworks, is well conceived, according to good practice and restorative justice standards internationally. All public prosecutors and all judges know about restorative justice, which is now also amongst them a generally accepted idea. Mediators and facilitators are well skilled and well trained, and they are well organised. However, in order to reach its full potential, restorative justice must become less dependent on its main referral source namely the criminal justice system. There are within the system important bottlenecks which are very difficult to deal with, and moreover as in most European countries the majority of crimes are not reported and not dealt with at all by the criminal justice system. This means that many citizens finally do not have access to restorative justice. One the one hand, it makes sense to further invest in collaboration, training and changing attitudes within the criminal justice system, but on the other hand, much more work should be done in order to build a broad societal support for restorative justice. In order to reach this, restorative justice programmes should focus much more on their affiliations with other social fields, including developing expertise with the media.

The years 2014 and following might entail a new perspective for restorative justice in Belgium, as an important new phase of the State reform process will take place. It is to be seen how the Communities and Regions will consider their new competences in the justice field, and whether a true community oriented system of restorative justice can play a role in this respect in order to adopt a wider application in practice.

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